IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RYAN L. BLANKENSHIP,

Petitioner,

v.

ROBERT WERLINGER, Warden,
Federal Correctional Institution – Oxford,

Respondent.

OPINION AND ORDER

12-cv-335-wmc

Federal prisoner Ryan L. Blankenship has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241, challenging the administration of his sentence by the United States Bureau of Prisons ("BOP"). In particular, Blankenship asserts that prison officials have failed to grant him sufficient credit for time spent in custody both before and after his federal sentence was imposed in *United States v. Blankenship*, No. 07-cr-20024 (C.D. Ill. Feb. 7, 2008). Blankenship also filed a motion for appointment of counsel and expedited review. After considering the parties' pleadings, related sentencing records and the applicable law, the court concludes that while Blankenship's disturbingly lengthy and varied record of criminal charges and convictions present a challenge in calculating his federal sentence and time served, there has been no error in the administration of his sentence. Accordingly, his petition will be denied.

FACTS

In addressing any *pro se* litigant's pleadings, the court must read his allegations generously. *See Haines v. Kerner*, 404 U.S. 519, 521 (1972). The following facts are taken from the pleadings, the exhibits, and available records from Blankenship's myriad, underlying federal and state convictions.

A. Chronology of Blankenship's State and Federal Charges

On April 16, 2006, Blankenship was arrested and charged with theft of more than $300 in Macon County, Illinois, Case No. 05CF1650. Blankenship was also charged in Macon County Case No. 06CF479 with aggravated criminal sexual abuse involving a victim younger than 13 years of age. At that time, Blankenship had other charges of theft and burglary pending against him in Macon County Case Nos. 06CF397, 06CF408, and 06CF492. On May 19, 2006, Blankenship was released from the Macon County Jail on bond.

On July 13, 2006, Blankenship was arrested and charged with unlawful possession of a firearm by a felon and possession of marijuana in Macon County Case No. 06CF1036. On August 22, 2006, he was again released on bond.

On November 14, 2006, Blankenship was charged with damage to property and aggravated battery in Macon County Case Nos. 06CF1584 and 06CF1585, but released that same day on a $5,000 personal recognizance bond.

On February 7, 2007, a grand jury in the United States District Court for the

Central District of Illinois returned an indictment against Blankenship, charging him with one count of wire fraud in violation of 18 U.S.C. §§ 1343 and 1342. *United States v. Blankenship*, No. 07-cr-20024 (C.D. Ill.) (the "federal case"). Specifically, Blankenship and a co-defendant were charged with having "stole, or caused to be stolen, property from retail merchants, such as Lowe's, Target, Best Buy, and also from Carle Hospital in Urbana, Illinois, and other locations, which they then caused to be sold throughout the United States through eBay for a fraction of its retail value." The indictment alleged further that the defendants' fraudulent enterprise had netted an amount of more than $100,000.00 from October 2005 through May 2006, which had been transferred through a PayPal account controlled by Blankenship.

In late February 2007, the State of Illinois issued a warrant for Blankenship's arrest on the theft charges in Macon County Case No. 06CF492. On March 2, 2007, Blankenship made an initial appearance in his federal case. Noting that Blankenship had an outstanding warrant from Macon County, the parties reached an agreement regarding his custody.[1] As a result of that agreement, the United States Marshal's Service ("USMS") temporarily held Blankenship in a cell at the federal courthouse on March 2, 2007, where Macon County served him with the arrest warrant from Case No. 06CF492. Pursuant to the parties' agreement, the USMS then transferred Blankenship's custody to state officials, who transported him to the Macon County Jail. On that same day, the United States District Court for the Central District of Illinois issued a writ of habeas

[1] The initial appearance was recorded and the respondent provided a transcription, along with

corpus *ad prosequendum*, ordering Macon County officials to permit Blankenship to appear in federal court for a detention hearing.

On March 8, 2007, the USMS executed the writ of habeas corpus *ad prosequendum*, and again assumed custody of Blankenship for purposes of his federal case. Blankenship was then transported to DeWitt County Jail pursuant to its contract with the USMS to hold federal pre-trial detainees. Shortly thereafter, the United States superseded the one-count federal indictment, amending the wire-fraud count and adding a second count to assert a claim for forfeiture. On November 6, 2007, Blankenship pled guilty under the terms of a written plea agreement to the wire-fraud charges alleged in count one of that superseding indictment. Blankenship remained in custody at the DeWitt County Jail while he awaited his federal sentence.

On February 5, 2008, Blankenship filed a motion to surrender the bond he had posted previously on the firearm-possession charges in Macon County Case No. 06CF1036, which was still pending against him in state court along with Case No. 06CF492 and several other cases. Two days later, the United States District Court for the Central District of Illinois sentenced Blankenship to serve 60 months' imprisonment, followed by a three-year term of supervised release. *See United States v. Blankenship,* Case No. 07-cr-20024 (C.D. Ill., Feb. 7, 2008). Pursuant to the written plea agreement, the Central District of Illinois dismissed the original indictment and the forfeiture allegation found in count two of the superseding indictment. The federal criminal judgment made

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a digital recording of the proceeding. Doc. # 11, Ex. B, Decl. of Angelica M. Santana.

no mention of the charges pending against Blankenship in state court.

On February 13, 2008, the USMS transferred Blankenship to state custody in Macon County. On April 21, 2008, Blankenship pled guilty to unlawful possession of a firearm as a felon in Macon County Case No. 06CF1036. The Macon County Circuit Court sentenced Blankenship to seven years' imprisonment in that case with "credit for time actually served in custody from [July 13, 2006] to [August 22, 2006] and [February 5, 2008] to [April 21, 2008]." Pursuant to the plea agreement in Case No. 06CF1036, all other pending cases against Blankenship, including the felony-theft charges in Macon County Case No. 06CF492, were dismissed.

Shortly after sentence was imposed in Case No. 06CF1036, the Macon County Sheriff's Department transferred Blankenship to the Illinois Department of Corrections to serve his state court sentence. While serving that sentence, Blankenship filed a motion in the Central District of Illinois, asking the sentencing court to award him credit for time served and modify his federal term of imprisonment to run concurrently with his state court term of confinement. The sentencing court denied the motion, explaining that it lacked authority to modify Blankenship's federal term of imprisonment in the manner proposed and that only the BOP could determine whether this kind of credit was appropriate. *See United States v. Blankenship*, 07-cr-20024 (C.D. Ill. Aug. 26, 2009). On December 23, 2010, Blankenship was released by the State of Illinois onto parole and taken into custody of the USMS, where he was housed at federal contract facilities until his transfer to the BOP.

B. Blankenship's Federal Sentence Calculation

When Blankenship arrived at the BOP, officials calculated the 60-month sentence that he received in his federal case to commence on the date he was paroled from state prison on December 23, 2010. Blankenship received "prior custody credit" for a previous arrest from the official date of the federal offense, May 8, 2006, through the time he was released on May 19, 2006, having posted bond. *See* 18 U.S.C. § 3585(a). Blankenship also received credit for time spent in the Macon County Jail from March 2, 2007, through March 8, 2007, which the state did not credit. With 19 days' credit for prior custody, the BOP determined that Blankenship could anticipate being released from federal prison on April 12, 2015.

On August 31, 2011, Blankenship filed an administrative remedy request (No. 654406) at his unit of assignment (FCI-Oxford) to challenge the calculation of his federal sentence. Blankenship requested credit for 35 days spent in confinement following his arrest in Macon County Case Nos. 05CF1650, 06CF397, 06CF408, and 06CF492. (These cases were ultimately dismissed on April 21, 2008, when Blankenship entered his guilty plea in exchange for the seven-year prison sentence imposed in Macon County Case No. 06CF1036.) Blankenship also requested 977 days of credit for the time he spent in state prison from March 2, 2007, through December 23, 2010. In effect, Blankenship requested a *nunc pro tunc* designation to have his federal sentence run concurrent with the one that he received in Macon County Case No. 06CF1036. Blankenship's request for relief was denied at the unit level on September 28, 2011, and his appeals were

unsuccessful.

Although Blankenship's administrative remedy request did not result in a reduction in his *term* of imprisonment, the BOP's Designation and Sentence Computation Center (DSCC) ultimately determined that Blankenship was entitled to credit for the time he spent at the DeWitt County Jail from March 8, 2007, through February 4, 2008. On October 3, 2012, the BOP revised its calculation of Blankenship's federal sentence. The revised calculation determined that Blankenship was entitled to 333 days of additional credit from March 8, 2007, through February 4, 2008, because this amount had not been credited previously toward his state or federal sentence. Dkt. # 12, Decl. of J.R. Johnson at ¶ 14. With projected credit for good conduct, the BOP estimated that Blankenship would be released from his current commitment on May 14, 2014.

C. Blankenship's Petition for a Federal Writ of Habeas Corpus

Blankenship now seeks relief pursuant to 28 U.S.C. § 2241, arguing that his continued detention is unlawful because the BOP has denied him credit for time served in custody in violation of 18 U.S.C. § 3585(b). Blankenship primarily argues that he is entitled to 977 days of credit (from March 2, 2007 to December 23, 2010) against his federal sentence for the time he served in state prison for his conviction in Macon County Case No. 06-CF1036. Blankenship further contends that he is entitled to 349 days of credit (from March 8, 2007, through February 13, 2008) against his federal sentence for

time served in custody as a federal pretrial detainee in the DeWitt County Jail.[2] Arguing that his sentence has been calculated in error, Blankenship maintains that he is entitled to his immediate release. The government disagrees and argues that the petition must be denied based on affidavits and administrative records regarding Blankenship's sentence calculation.

OPINION

A petition for a writ of habeas corpus under 28 U.S.C. § 2241 is the proper vehicle for challenges to the administration or computation of a sentence. *See Walker v. O'Brien*, 216 F.3d 626, 629 (7th Cir. 2000); *Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998); *Carnine v. United States*, 974 F.2d 924, 927 (7th Cir. 1992) (citations omitted). Because Blankenship is confined in this district, this court has jurisdiction and is the proper venue to determine whether he has articulated a valid claim for relief under § 2241 by demonstrating that his sentence has been calculated in error. *See Moore v. Olson*, 368 F.3d 757, 758-59 (7th Cir. 2004) (venue or proper place for filing a challenge to the administration of sentence is the district in which the prisoner is confined).

[2] Blankenship also seeks 35 days of credit for time spent in custody following his arrest in Macon County Case Nos. 05CF1650, 06CF397, 06CF408, and 06CF492. He provides no specific facts detailing when he was taken into custody in each of these cases exclusively, a feat obviously made difficult by the number of charges pending against him in state court. It is a moot point, however, because the respondent notes and records confirm that Blankenship did not raise this request during his administrative appeal. This claim is, therefore, subject to dismissal for failure to exhaust available administrative remedies. *See United States v. Lemus-Rodriguez*, 495 F. App'x 723, 726-727 (7th Cir. 2012) (citing *United States v. Montroy*, 207 F. App'x 710, 712 (7th Cir. 2006)). Because Blankenship does not dispute this argument or offer any explanation for his failure to properly assert his claim on administrative

I. Legal Standard for Calculating "Prior Custody" Credit

All of Blankenship's claims concern the BOP's calculation of the amount of credit he was eligible to receive against his federal sentence for time served in prior custody of the State of Illinois. The process of calculating the amount of credit for time served in prior custody is governed by 18 U.S.C. § 3585.

Once a federal sentence is imposed, the BOP is responsible for calculating the amount of credit, if any, the offender is due for time served in custody before the commencement of his sentence. *See United States v. Wilson*, 503 U.S. 329, 331-32 (1992). Thus, calculating a federal sentence under § 3585 "requires two separate determinations: first, when the sentence commences; and, second, to what extent the defendant in question may receive credit for any time already spent in custody." *United States v. Smith*, 812 F. Supp. 368, 370 (E.D.N.Y. 1993).

According to § 3585(a), a federal sentence of imprisonment commences "on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served." Pursuant to BOP policy, a defendant's sentence commences on the date it is imposed only if he is truly in federal custody at the time he is sentenced, and not in custody of another sovereign. *See* Decl. J.R. Johnson, at ¶ 13 (citing Program Statement 5880.28 *Sentence Computation Manual New Law/CCCA*). For example, a writ of habeas

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review, the court does not address it further.

corpus *ad prosequendum* "permits one sovereign -- called the 'receiving sovereign' -- to 'borrow' temporarily a person in the custody of another sovereign -- called the "sending sovereign" -- for the purpose of prosecuting him." *Jake v. Hershberger*, 173 F.3d 1059, 1062 n.1 (7th Cir. 1999). For the duration of his prosecution, the borrowed prisoner remains in custody of the sending sovereign, not the receiving sovereign.[3] *Id.* (citing *Flick v. Blevins*, 887 F.2d 778, 781 (7th Cir. 1989)).

Where multiple sentences are imposed on the same defendant at different times, such as when a defendant receives a federal sentence followed by a state sentence, his terms of imprisonment are deemed to run consecutively unless the court orders them to be served concurrently. *See* 18 U.S.C. § 3584(a); *see also United States v. Kanton*, 362 F.2d 178, 179-80 (7th Cir. 1966) (per curiam) ("Absent clear intent to have defendant's sentence run concurrently with any state sentence, the execution of his federal sentence did not begin to run until the United States Marshal assumed custody over him at his place of detention to await transportation to the federal penitentiary.") (citation omitted).

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[3] "[A] prisoner detained pursuant to a writ of habeas corpus *ad prosequendum* remains in the primary custody of the first jurisdiction unless and until the first sovereign relinquishes jurisdiction over the prisoner." *Rios v. Wiley*, 201 F.3d 257, 274 (3rd Cir. 2000) (citing *Jake v. Herschberger*, 173 F.3d 1059, 1061 n. 1 (7th Cir. 1999); *Chambers v. Holland*, 920 F. Supp. 618, 622 (M.D. Pa. 1996), *aff'd* 100 F.3d 946 (3d Cir. 1996); *United States v. Smith*, 812 F. Supp. 368, 371-72 (E.D.N.Y. 1993)). "Producing a state prisoner under a writ of habeas corpus *ad prosequendum* to answer federal charges does not relinquish state custody." *Jimenez v. Warden, FDIC, Fort Devens, Mass.*, 147 F. Supp. 2d 24, 28 (D. Mass. 2001) (citing *Thomas v. Brewer*, 923 F.2d 1361, 1366-67 (9th Cir. 1991); *Salley v. United States*, 786 F.2d 546, 547-48 (2d Cir. 1986); *Chambers v. Holland*, 920 F. Supp. 618 (M.D. Pa. 1996); *Crawford v. Jackson*, 589 F.2d 693, 695 (D.C. Cir. 1978)). Thus, a state prisoner is not "in custody" for purposes of 18 U.S.C. § 3585 when he appears in federal court pursuant to a writ of habeas corpus *ad prosequendum*; rather, "he is merely 'on loan' to federal authorities." *Stewart v. Bailey*, 7 F.3d 384, 389 (4th Cir. 1992) (quoting *Thomas v. Whalen*, 962 F.2d 358, 361 n.3 (4th Cir. 1992))

Where a district court is silent as to whether a federal sentence is to be served concurrently with a subsequent state court sentence, the BOP may effectively make the sentences concurrent by designating the state prison as the place of imprisonment for purposes of the federal sentence. *Setser v. United States*, — U.S. —, 132 S. Ct. 1463, 1467-68 (2012). The BOP may make this designation while the prisoner is in state custody or it may make "a *nunc pro tunc* designation once the prisoner enters federal custody." *Id.*, 132 S. Ct. at 1468, n.1. The BOP may also decline to make such a designation altogether. *See id.*, 132 S. Ct. at 1468; *see also Barden v. Keohane*, 921 F.2d 476, 478 (3rd Cir. 1990) (the BOP has broad discretion to consider making a *nunc pro tunc* designation, but has no obligation to grant such a designation). The decision whether to make a *nunc pro tunc* designation is vested within "the agency's substantial discretion under 18 U.S.C. § 3621." *Fegans v. United* States, 506 F.3d 1101, 1105 (citations omitted).

Credit is allowed for prior custody only if the time spent in official detention is not credited against another sentence, as follows:

> A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences —
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> (1) as a result of the offense for which the sentence was imposed; or
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> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was

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(distinguishing between the writ of habeas corpus *ad prosequendum* and a detainer).

imposed;

that has not been credited against another sentence.

18 U.S.C. § 3585(b). The Supreme Court has observed that, by prohibiting credit for prior custody that is attributable to another sentence, a federal prisoner may not receive "double credit for his detention time." *Wilson*, 503 U.S. at 337. In other words, a federal prisoner may not receive credit for time served before the imposition of his federal sentence "when that credit has already been applied against another sentence." *United States v. Ross*, 219 F.3d 592, 594 (7th Cir. 2000).

II. Blankenship's Request for "Prior Custody" Credit

Here, the United States District Court for the Central District of Illinois imposed a 60-month sentence for Blankenship's wire-fraud conviction in Case No. 07-cr-20024 on February 8, 2008. On April 21, 2008, the Macon County Circuit Court imposed a seven-year term of imprisonment for Blankenship's firearm-possession conviction in Macon County Case No. 06CF1036, with credit for time served from July 13 to August 22, 2006, and February 5, to April 21, 2008. On December 23, 2010, Blankenship was released from state prison on a detainer and taken into federal custody by the USMS. Based on this history, the BOP determined that Blankenship's federal sentence commenced on December 23, 2010.

According to the most recent calculation of his sentence, the BOP awarded credit for time served from the date of his arrest on May 8, 2006, through the date he was

released on bond on May 19, 2006. Pursuant to § 3585(b), Blankenship also received credit for time served in Macon County and the DeWitt County Jail from March 2, 2007, through February 4, 2008, because this time was not applied previously to his state sentence. Blankenship's requests for additional credit are addressed briefly below.

A. Concurrent Sentence Credit -- 977 Days

Blankenship argues that he is entitled to credit for 977 days spent in state custody, from March 2, 2007, through December 23, 2010, as the result of his conviction in Macon County Case No. 06CF1036. The BOP determined that he is not eligible for this kind of credit, because it would, in effect, render Blankenship's federal and state sentences concurrent. The respondent maintains that this decision was appropriate under the circumstances and that there was no abuse of discretion on the BOP's part.

As outlined in the chronology, the BOP entertained Blankenship's administrative request for a *nunc pro tunc* designation of the Illinois Department of Corrections as the prison facility for service of his federal sentence. The request was denied at the unit level on September 28, 2011, when Warden Werlinger responded that he could not receive credit for time spent serving another sentence. After Blankenship filed an administrative appeal, the BOP affirmed that decision after considering the applicable statutory factors found in 18 U.S.C. § 3621(b), including: (1) the resources of the facility contemplated; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement by the sentencing court; and (5) any pertinent policy statement issued by the United States Sentencing Commission. *See* Dkt. # 12, Decl. of

J.R. Johnson, Ex. J (the worksheet used to determine whether a *nunc pro tunc* designation was warranted in Blankenship's case).

Blankenship concedes, as he must, that the federal sentencing court gave no indication of any intent to allow his 60-month term of imprisonment in the federal case to be served concurrently with a state sentence that had yet to be imposed.[4] Absent an indication of intent from the sentencing court, the ultimate decision whether to treat Blankenship's sentence as concurrent by making a *nunc pro tunc* designation is "committed exclusively to the Bureau of Prisons." *Setser*, 132 S. Ct. at 1468. Because the BOP's decision in Blankenship's case was deliberately considered under the statutory factors found in 18 U.S.C. § 3621(b), that decision is not one which this court can "lightly second guess." *Taylor v. Sawyer*, 284 F.3d 1143, 1149 (9th Cir. 2002). Since Blankenship offers no compelling reason to set aside that decision, his request for relief will be denied.

B. Credit Pretrial Detention in DeWitt County Jail

Blankenship also requests credit for time served as a federal pretrial detainee in the DeWitt County Jail from March 8, 2007, through February 13, 2008. This claim is easily dispatched. On October 2, 2012, the BOP considered Blankenship's request for

[4] Where a federal sentence is concerned, the sentencing court's intention, as expressed in the judgment, is the only one that matters. In that respect, it is well established that a state court has no authority to force a state sentence to run concurrent with a federal term of imprisonment. *See Taylor v. Sawyer*, 284 F.3d 1143, 1151, 1153 & n.11 (9th Cir. 2002); *Jake v. Herschberger*, 173 F.3d 1059, 1065 (7th Cir. 1999); *McCarthy v. Doe*, 146 F.3d 118, 120-21 (2d Cir. 1998); *United States v. Yates*, 58 F.3d 542, 550 (10th Cir. 1995); *Del Guzzi v. United States*, 980 F.2d 1269, 1270 (9th Cir. 1992); *United States v. Sackinger*, 704 F.2d 29, 32 (2d Cir. 1983).

additional credit for prior custody and decided to recalculate his sentence. In doing so, the BOP authorized an additional 333 days of credit for the time Blankenship served in DeWitt County Jail, from March 8, 2007, through February 4, 2008. To the extent that Blankenship seeks additional credit for time served between February 5, and February 13, 2008, this time has been credited previously to the state court sentence imposed in Macon County Case No. 06CF1036. Blankenship cannot get credit for time spent in prior custody because 18 U.S.C. § 3585(b) prohibits "double credit." *Wilson*, 503 U.S. at 337. Accordingly, this claim is without merit.

Because Blankenship has failed to demonstrate that his sentence was calculated in error or that his continued detention is unlawful, he is not entitled to relief under 28 U.S.C. § 2241.

ORDER

IT IS ORDERED that

1. Ryan A. Blankenship's petition for a writ of habeas corpus is DENIED and this case is DISMISSED with prejudice.
2. Blankenship's motion for appointment of counsel and motion for expedited review are DENIED as moot.

Entered this 18th day of June, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge